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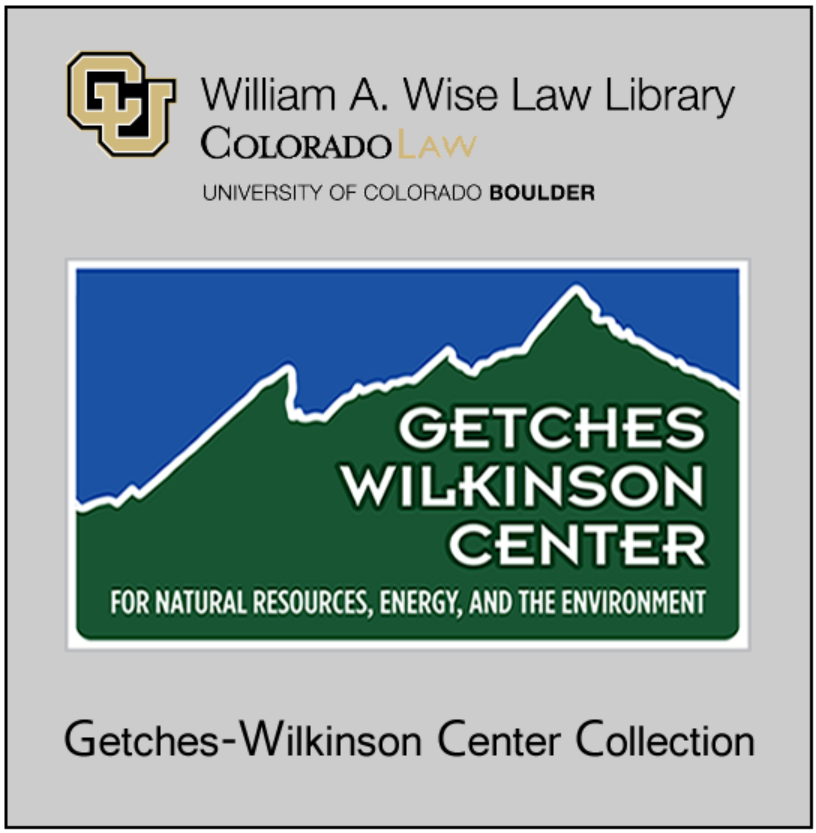
Regulatory Takings and Resources: What Are the Constitutional Limits?

Virginia S. Albrecht



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REGULATORY TAKINGS AND RESOURCES: WHAT ARE THE CONSTITUTIONAL LIMITS?

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REGULATORY TAKINGS & RESOURCES: WHAT ARE THE CONSTITUTIONAL LIMITS?

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REGULATORY TAKINGS AND RESOURCES: WHAT ARE THE CONSTITUTIONAL LIMITS?

Virginia S. Albrecht
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I. Takings Claims Against the Federal Government -- In General

A. The just compensation clause of the fifth amendment states ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

1. Eminent Domain

When the federal government condemns land to create a public recreation area, it must pay the property owner "just compensation." See United States v. 564.54 Acres of Land, 441 U.S. 506 (1979).

2. Inverse Condemnation

While a typical taking occurs when the government condemns property under its power of eminent domain, the doctrine of "inverse condemnation" is based on the proposition that a taking may occur without the initiation of formal proceedings. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 315 (1987). The Supreme Court has observed that the "self-executing character of the constitutional provision with respect to compensation" entitles a landowner to bring an action in inverse condemnation when government action works a taking of property rights. Id.

3. Physical Takings

The Supreme Court has ruled that physical occupation of property, no matter how small, effects a taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982). A permanent physical occupation of property by the government is a taking without regard to the public interests served. Id. at 426.

4. Regulatory Takings

The Supreme Court in 1922 recognized that regulatory action may also constitute a "taking" that requires just compensation. In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), the Court stated "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

5. Jurisdiction

The U.S. Court of Federal Claims (formerly the Claims Court) in Washington, D.C. has exclusive jurisdiction over takings claims against the federal government for sums in excess of $10,000. Lesser claims may be brought in either the U.S. Court of Federal Claims or federal district court. 28 U.S.C. §§ 1346, 1491(a).

In Keene Corp. v. United States, 113 S. Ct. 2035 (1993), the Supreme Court held that under 28 U.S.C. § 1500, the U.S. Court of Federal Claims may not exercise jurisdiction over an action if the plaintiff has brought a claim in another court based on the same operative facts. The government's view is that Keene prohibits a plaintiff from bringing a takings claim based on a permit denial in the U.S. Court of Federal Claims while simultaneously challenging the Corps' permit denial in federal district court. The Federal Circuit is currently considering the government's theory in Loveladies Harbor v. United States.

If plaintiffs are unable to bring simultaneous actions, they may run afoul of the U.S. Court of Federal Claims's 6-year statute of limitations. See 28 U.S.C. § 2501. For example, in Creppel v. United States, 30 Fed. Cl. 323 (1994), a number of landowners had brought an action in 1977 in federal district court challenging the validity of a 1976 Corps order that scaled back a proposed land reclamation project. In 1984, the district court ordered that the original project should proceed, but stayed the order until EPA could decide whether to commence veto proceedings. In 1985, EPA decided to veto the project, and the Agency's veto was upheld by the district court in 1988. In 1991, the plaintiffs filed suit in the Court of Federal Claims, alleging a taking without just compensation stemming from the cancellation of the original project. The Court of Federal Claims held that the Corps order issued in 1976 was a final action, and thus the statute of limitations on all claims arising from the order began to run in 1976. The court noted, however, that "[h]ad plaintiffs filed suit in this court earlier and had the suit been either suspended or dismissed, an argument for section 1500 tolling might exist." Id.

B. Overview of Supreme Court Tests for Regulatory Takings Claims

1. Regulatory Takings Test

The Supreme Court has emphasized that there is no set formula for determining when government action effects a taking. The Court has, however, ruled that the regulation of property may effect a taking of

property if the regulation either:

- fails to substantially advance a legitimate state interest, or

- denies an owner economically viable use of his land. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

2. Categorical Rule

If government action denies a landowner all economically beneficial or productive use of his property, a taking will be found unless the claimant's proposed use would constitute a nuisance under "background principles" of state law. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893, 2899 (1992).

3. Ad Hoc Factual Inquiry

In engaging in essentially ad hoc factual inquiries, the Court has identified three factors of particular importance in determining whether government action works a taking: (1) the character of the government action; (2) the economic impact of the regulation; and (3) the extent to which the action interferes with reasonable investment-backed expectations. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

a. Character of the Government Action

If the government's action can be characterized as a physical invasion of the property, a court will be more likely to find a taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

b. Economic Impact of the Regulation as Applied

In deciding whether a regulation effects a taking, the Supreme Court has considered the economic impact of a regulation by comparing the value of the property before and after the regulation's interference with the property. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). However, mere diminution in property value as a result of government regulation does not amount to a compensable taking. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

c. Interference with Investment-Backed Expectations

In determining whether government regulation amounts to an unconstitutional taking, courts will also consider the impact of the action on the property owner's reasonable investment-backed expectations. See Penn Central, 438 U.S. at 124. In Penn Central, the Supreme Court observed that because a New York City landmark law did not interfere with current uses of the parcel and allowed a reasonable return on the original investment made in the property, the law did not interfere with plaintiff's investment-backed expectations. Id. at 136. A property owner challenging restrictions that the government imposed after the owner acquired the property has a better chance of bringing a successful takings claim. See, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2889 (1992) (observing that plaintiff was not subject to beachfront development restrictions at the time he acquired the property).

4. Existence of Compensable Property Interest

Before a claimant may recover just compensation under the Fifth Amendment, she must establish that, at the time of the alleged taking, she held an interest in the property "taken" by the government. Lucas, 112 S. Ct. at 2899-900; Lacey v. United States, 595 F.2d 614, 619 (Ct. Cl. 1979). In the absence of such an interest, a claimant cannot proceed with a takings claim as to the "unowned" land. See, e.g., Plantation Landing Resort, Inc. v. United States, 30 Fed. Cl. 63 (1993) (holding that no property interest existed where 50.5 acres of claimant's 59-acre project lay below the mean high water mark and thus could only be owned by a private party if that party obtained a reclamation permit from the State of Louisiana; claimant had obtained such a permit but had allowed the permit to expire, which extinguished the claimant's compensable interest in the 50.5 acres); 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575 (1992) (holding that significant revenue losses suffered by plaintiff during Section 404 permit review process were not compensable as a temporary taking; the plaintiff was never entitled to a section 404 permit and thus its economic interest in obtaining the permit was not a compensable property interest).

II. Takings Claims Against the Federal Government Arising in the Context of the Federal Wetlands Regulatory Program

A. Overview Of Wetlands Takings Claims

By far the most developed case law concerning federal regulatory takings has arisen in the context of federal wetlands regulation under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Many of the issues considered by the U.S. Court of Federal Claims in the wetlands context are relevant to possible takings claims based on other federal environmental and land use regulations.

1. In deciding whether the denial of a Section 404 permit gives rise to a compensable taking, the U.S. Court of Federal Claims has generally focused on the second prong of the Supreme Court's taking test; namely, whether the denial of a Section 404 permit denies economically viable use of the property.

2. The U.S. Court of Federal Claims has recognized that the requirement that a property owner obtain a Section 404 permit before filling wetlands advances legitimate government interests and promotes the public welfare. See, e.g., Deltona Corp. v. United States, 657 F.2d 1184, 1192 (Cl. Ct. 1981), cert. denied, 455 U.S. 1017 (1982); Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388 (1988) (Loveladies Harbor I). Accordingly, a challenge based on the assertion that the Section 404 regulations do not advance legitimate state interests is unlikely to succeed.

B. Application of Ad Hoc Factual Inquiry

1. Character of the Government Action

In Loveladies Harbor I, 15 Cl. Ct. at 391, the U.S. Court of Federal Claims observed that the denial of plaintiff's Section 404 permit was not equivalent to a "physical destruction or intrusion attendant with an act of eminent domain." Nonetheless, where the government draws a line in time, prohibiting activity that had formerly been allowed, a taking may be found if the government is attempting to achieve a general public goal at the expense of an individual landowner. Florida Rock Indus. v. United States, 21 Cl. Ct. at 168-69; Bowles v. United States, 1994 WL 102117, *15n. 14. (Fed. Cl. March 24, 1994).

2. Economic Impact of the Regulation as Applied

The fact that a Section 404 permit is denied, without more, does not

effect an unconstitutional taking. United States v. Riverside Bayview Homes, Inc., 474 U.S. 128 (1985); see Loveladies Harbor I, 15 Cl. Ct. at 391. To determine economic impact, the Court of Federal Claims will compare the fair market value of the property before and after permit denial. Bowles v. United States, 1994 WL 102117, *6 (Fed. Cl. March 24, 1994).

a. Mere Diminution in Value Is Not Compensable

In Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Ct. Cl. 1981), the Court of Claims ruled that mere diminution in value as a result of the government's denial of the highest and best use of property does not, by itself, establish a taking.

b. Must Show Loss of Economically Viable Use

The denial of a Section 404 permit may effect a taking of property if the effect of the denial is to prevent economically viable use of the land in question. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Bowles v. United States, No. 303-88L, 1994 WL 102117, at *10-11 (Fed. Cl. Mar. 24, 1994); Florida Rock Indus. v. United States, No. 91-5156, 1994 U.S. App. LEXIS 4401 (Fed. Cir. Mar. 10, 1994); Formanek v. United States, 26 Cl. Ct. 332 (1992) (Formanek II); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990) (Loveladies Harbor II).

(1) Developable Uplands

The existence of developable uplands within the wetlands parcel may provide sufficient value to defeat a takings claim. See Deltona Corp., 657 F.2d at 1192 (ruling that the denial of a Section 404 permit does not effect a taking where property contains uplands that could be developed without a Corps permit). In Jentgen v. United States, 657 F.2d 1210, 1213 (Cl. Ct. 1981), cert. denied, 455 U.S. 1017 (1982), the U.S. Court of Federal Claims ruled that the denial of a Section 404 permit did not amount to a taking where the Corps offered a permit to allow the development of more than 20 acres of the 80 acres covered by the permit and the tract contained an additional 20 acres of developable upland not subject to Corps permitting requirements.

The U.S. Court of Federal Claims has, however, awarded compensation for a taking based on a permit denial despite the presence of upland areas where the upland property is surrounded by wetlands and cannot be accessed without a Corps permit. Loveladies Harbor II, 21 Cl. Ct. at 159; Formanek II, 26 Cl. Ct. 332.

The U.S. Court of Federal Claims has held, however, that the mere presence of uplands, without a showing that a market exists for proposed uses of the uplands, fails to defeat a takings claim. Formanek II, 26 Cl. Ct. 332.

(2) Recreational and Conservation Uses

In Loveladies Harbor II, 21 Cl. Ct. at 158-59, the government unsuccessfully argued that sufficient economically viable uses remained in the property subject to a permit denial because the property could be used for hunting, bird watching, agriculture, conservation, a marina, or as a mitigation site for other developers. The U.S. Court of Federal Claims rejected these arguments because the government failed to show that the proposed uses were reasonably probable or that a market existed for such uses.

(3) Offers to Purchase

The existence of a market in which a property owner could have obtained value for its property may be sufficient to defeat a takings claim. "The market from which a fair market value may be ascertained need not contain only legally trained (or advised) persons who fully investigate current land use regulations; ignorance of the law is every buyer's right." Florida Rock Indus. v. United States, No. 91-5156, 1994 U.S. App. LEXIS 4401, at *15 n.12 (Fed. Cir. Mar. 10, 1994).

An offer by a conservation group to purchase the property at a fraction of the property's value before the permit denial does not demonstrate an "economically viable use" sufficient to prevent a court from finding that the permit denial effected a taking. Formanek v. United States, 18 Cl. Ct. 785 (1989) (Formanek I).

3. Interference with Investment-Backed Expectations

In Ciampitti v. United States, 22 Cl. Ct. 310, 321 (1991) (Ciampitti II), the U.S. Court of Federal Claims ruled that the denial of a Section 404 permit did not effect a taking where the plaintiff purchased the property in 1983, had knowledge of the restrictions applicable to the property, and agreed to purchase restricted wetlands as part of a package deal that included developable uplands. Because the plaintiff had ample warning of the likelihood that the wetlands could not be developed, the U.S. Court of Federal Claims ruled that the permit denial did not interfere with the plaintiff's reasonable investment-backed expectations.

In Deltona Corp., 657 F.2d at 1193, the U.S. Court of Federal Claims acknowledged that the stiffening of Corps requirements that resulted in a denial of a Section 404 permit "substantially frustrated" plaintiff's reasonable investment-backed expectations. However, the denial did not effect a taking because economically viable uses remained for the property. Moreover, the U.S. Court of Federal Claims observed that it was "'quite simply untenable'" that property owners may establish a taking simply by demonstrating that "'they have been denied the ability to exploit a property interest that they heretofore had believed was available for development.'" Id. (quoting Penn Central, 438 U.S. at 130). But see Nollan, 483 U.S. at 841 n.2 (observing that building on one's own land is a right, not a governmental benefit).

C. Ripeness

1. Submission of a Permit Application

In Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983), the court ruled that a takings claim made before plaintiff complied with Corps permit procedures was premature. See also United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979) (ruling that plaintiff could not assert a takings claim until after applying for a Section 404 permit because of the possibility that the Corps might issue a permit); Riverside Bayview Homes, 474 U.S. at 127 (stating that "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred").

2. Final Decision

In Loveladies Harbor I, 15 Cl. Ct. at 386, the U.S. Court of Federal

Claims rejected arguments by the government that plaintiff's inverse condemnation claim was not ripe for review after the denial of a single Section 404 permit application. The court distinguished Supreme Court rulings that had dismissed takings claims as unripe because there had been no final determination by the government as to the number of dwelling units that would be allowed. The court observed that the Corps' permit denial was based on environmental concerns and that any development on the property would have similar environmental impacts, demonstrating that development on the property was unacceptable per se. Moreover, the court noted that the Corps failed to provide any alternative development options. Accordingly, the case was ripe for judicial review.

In Beure'-Co. v. United States, 16 Cl. Ct. 42 (1988), the U.S. Court of Federal Claims also ruled that the Corps' denial of a Section 404 permit was a final decision because the denial, based on ecological concerns, could be read as an intention to deny any future 404 applications for discharges onto the subject property. The court noted that the Corps did not suggest any modifications or appropriate or practical mitigation measures that would have allowed development of the property. See also Formanek I, 18 Cl. Ct. at 793 (holding plaintiff's taking claim ripe for review where the Corps' decision to deny a permit could be read as foreclosing development on any part of the wetlands complex).

3. Requirement to Seek a Variance Inapplicable

In Beure'-Co., 16 Cl. Ct. at 49, the U.S. Court of Federal Claims rejected arguments by the government that plaintiff's inverse condemnation claim was not ripe because he had not sought a "variance" from the Corps' denial. The court found no procedures in Corps regulations that would allow a property owner to seek a variance or analogous relief from a permit denial.

4. Denial of Necessary State Approvals Does Not Bar Federal Claim

In Ciampitti v. United States, 18 Cl. Ct. 548, 552-53 (1989) (Ciampitti I), the U.S. Court of Federal Claims ruled that New Jersey's denial of a Coastal Zone Management Plan consistency determination, a prerequisite to the granting of a Section 404 permit, did not render plaintiff's inverse condemnation claim premature. The court observed that the Corps' permit denial was based on grounds independent of the State's denial of a consistency determination. The court stated that a plain reading of the Corps' decision to deny the permit application

indicated that the Corps would have denied the permit regardless of the State's action. The court also ruled that the plaintiff's failure to even apply for necessary state water quality certification did not render the claim premature.

D. The "Parcel as a Whole"

In determining the economic impact of the government action, the court will consider the impact on the "parcel as a whole." Penn Central, 438 U.S. at 115. Thus, if an owner has been denied economic use of part of a parcel but retains economic use of other parts of the parcel, a court will not find a taking. This rule is in flux. See Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). Florida Rock Industries v. United States, 1994 WL 83987 (Fed. Cir., March 10, 1994).

1. Property Sold Before the Time of the Taking Excluded

In Loveladies Harbor I, 15 Cl. Ct. at 392, the U.S. Court of Federal Claims excluded from the parcel as a whole property that was part of plaintiff's original purchase but that had been sold by the time of the alleged taking. See also Formanek II, 26 Cl. Ct. 332 (excluding from consideration portions of the property sold before the date of the Corps' permit denial).

2. Noncontiguous Property Generally Excluded

In Penn Central, 438 U.S. at 115, 130-31, the Supreme Court defined the "parcel" as including only the property that was subject to the landmark designation. The court noted that plaintiff owned numerous other properties throughout Manhattan but did not include those noncontiguous properties in the property against which the government's action was measured.

Citing Penn Central, the U.S. Court of Federal Claims in Loveladies Harbor I, 15 Cl. Ct. at 392, excluded parcels that were part of the plaintiff's original purchase but were no longer contiguous to the property allegedly taken by the government and were not affected by the Corps' permit denial.

However, in Ciampitti v. United States, 22 Cl. Ct. 310 (1991) (Ciampitti II), the U.S. Court of Federal Claims included noncontiguous property held by the plaintiff in the "parcel as a whole." The court expressed some concern about the lack of contiguity but noted that the plaintiff had viewed both portions as a single parcel for

purposes of purchase and financing. The court also stated that at the time the plaintiff was negotiating for the acquisition of the property, he retained ownership of lots that linked the two portions.

3. Legally Undevelopable Property Excluded

In Loveladies Harbor I, 15 Cl. Ct. at 393, the U.S. Court of Federal Claims excluded from the parcel as a whole a portion of contiguous property that could not be developed because the State of New Jersey had previously denied necessary development permits for that portion of the property.

In Florida Rock Indus. v. United States, 791 F.2d 893, 904-05 (Fed. Cir. 1986) (Florida Rock II), cert. denied, 479 U.S. 1053 (1987), the court considered the parcel to consist of only the 98 acres subject to plaintiff's permit application (which the Corps denied) rather than the entire 1,560-acre wetland tract owned by plaintiff. In this case, the Corps limited the area of the permit application to 98 acres--the amount of land that could be mined in the three-year period (the normal duration of Corps permits). The court declined to speculate on the outcome of future permit applications. Presumably, the plaintiff would have been required to apply for 15 98-acre permits, ripening 15 successive takings claims in order to obtain just compensation for the entire parcel. This result was rejected by subsequent Supreme Court decisions.

4. Developable Uplands Included

The U.S. Court of Federal Claims has consistently included upland portions of the property (i.e., portions of the property that are not subject to Corps regulation) in the "parcel as a whole."

In Deltona Corp. v. United States, 657 F.2d at 1192, the U.S. Court of Federal Claims held that the denial of a Corps permit did not effect a taking because plaintiff retained 111 acres of upland that could be developed without a Corps permit. See also Jentgen v. United States, 657 F.2d at 1213 (Cl. Ct. 1981) (the existence of developable uplands provided economically viable uses sufficient to defeat a takings claim).

In Ciampitti II, 22 Cl. Ct. at 318, the U.S. Court of Federal Claims included noncontiguous upland portions of plaintiff's property that were part of plaintiff's original purchase, stating that "[i]n the case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore

whatever rights remain in the uplands."

In Loveladies Harbor II, 21 Cl. Ct. at 159, the U.S. Court of Federal Claims considered the value of one acre of upland owned by plaintiff that was surrounded by wetland. The court concluded, however, that the upland did not provide sufficient value to defeat a takings claim because a denial of a permit to fill surrounding wetlands had effectively precluded development of the upland as well.

In Formanek II, 26 Cl. Ct. 332, the U.S. Court of Federal Claims ruled that the presence of 12 acres of upland on a 112-acre tract was not sufficient to defeat a takings claims. The court noted that a fill permit would be required to access the upland portions of the property and that the government failed to demonstrate that a market existed for proposed uses of the uplands.

E. Temporary Takings

1. The U.S. Court of Federal Claims has ruled that a sixteen-month delay in the processing of a Section 404 permit by the Corps (during which time the value of the property dropped) did not amount to an "extraordinary delay" and thus did not give rise to a temporary takings claim. Dufau v. United States, 32 Env't Rep. Cas. (BNA) 1524 (Cl. Ct. 1990).

2. In 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575 (1992), a property owner alleged a temporary taking based on the Corps' initial denial of a Section 404 permit. The property owner first challenged the Corps' permit denial in federal district court, and the court ordered the Corps to either reconsider the permit denial or institute condemnation proceedings. The Corps denied the permit a second time and only after a further court order did it issue a Section 404 permit. The property owner filed suit in the U.S. Court of Federal Claims seeking compensation for the five-year delay in the project caused by the Corps' permit denials. The U.S. Court of Federal Claims ruled that the conduct of the Corps did not effect a temporary taking because plaintiff did not have a property right to the fill permit during the time in question, nor did the administrative review process amount to "extraordinary delay." Id. at 578.

3. In Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334 (1992), aff'd sub nom. Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993), plaintiffs brought a temporary takings claim based on the economic impact of a Corps cease-and-desist order. Plaintiffs had previously and

successfully challenged in federal court the Corps' basis for exercising jurisdiction over the area in question. Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726 (E.D. Va. 1988) (ruling that the Corps could not exercise jurisdiction over the site based on the "migratory bird rule" because the Corps had not adopted the rule in accordance with the formal rulemaking requirements of the Administrative Procedure Act), aff'd, 885 F.2d 866 (4th Cir. 1989). In the later case, the U.S. Court of Federal Claims ruled that plaintiffs were not entitled to compensation for the three-year period during which the Corps asserted jurisdiction over the property because plaintiffs were able to sell upland lots during this time and were thus not deprived of all economically viable use of their property. Tabb Lakes, 26 Cl. Ct. at 1352.

F. The Nuisance Exception

If the claimant's proposed use of its property would amount to a nuisance, just compensation is not required even if the government's action precludes all use; this is so because plaintiff can have no property interest in carrying out a nuisance. Lucas v. South Carolina Coastal Council, 112 S.Ct. at 2899. The government has the burden of establishing that the proposed use would constitute a nuisance. Bowles v. United States, 1994 WL 102117, *6 (Fed. Cl., March 24, 1994).

1. Discharge of Dredged or Fill Material Not a Nuisance

In Florida Rock Indus. v. United States, 21 Cl. Ct. 161, 166-67 (1990) (Florida Rock III), vacated and remanded on other grounds, No. 91-5156, 1994 U.S. App. LEXIS 4401 (Fed. Cir. Mar. 10, 1994), the U.S. Court of Federal Claims ruled that plaintiff's proposed limestone mining in wetlands did not constitute a public nuisance because the activity did not significantly increase the risk of contaminating area aquifers. The court also noted that there were many limestone quarries in the vicinity of plaintiff's property. The court observed that "the assertion that a proposed activity would be a nuisance merely because Congress chose to restrict, regulate, or prohibit it for the public benefit indicates circular reasoning that would yield the destruction of the fifth amendment." Id. at 168.

In Loveladies Harbor II, 21 Cl. Ct. at 154 n.3, the U.S. Court of Federal Claims recognized that the plaintiff's proposed filling of wetlands for residential development would not constitute a nuisance. In doing so, the court noted that the State of New Jersey had granted state water quality certification and that it is the State's function to

regulate land use. The court deferred to the State's findings concerning pollution arising from the activity. Id.

2. Wetlands Development as Equivalent to a Nuisance

A few state courts have ruled that the development of wetlands amounts to a public harm that can be prohibited under the government's police powers without giving rise to an unconstitutional taking. See Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972) (ruling that a county ordinance prohibiting the filling of wetlands prevented a public harm that would arise from the alteration of the natural character of the wetland property and therefore did not effect a taking); Orion Corp. v. Washington State, 747 P.2d 1062, 1081 (Wash. 1987), cert. denied, 486 U.S. 1022 (1988) (ruling that state and local regulation of tidelands did not give rise to a taking, stating "no compensable taking can occur as long as regulations substantially serve the legitimate public purpose of prohibiting uses of property injurious to the public interest in health, the environment, or the fiscal integrity of the community"). The Supreme Court's decision in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), will make it more difficult for the government to raise the nuisance defense to takings claims.

G. Damage Award

1. Just Compensation

The U.S. Court of Federal Claims has recognized that the proper measure of just compensation for the taking of property is the fair market value of the property at the time of the taking. See Loveladies Harbor II, 21 Cl. Ct. at 160 (awarding $2,658,000 plus interest for the taking of 12.5 acres of land). Successful plaintiffs should also receive interest on that amount from the time of the taking. Id.; see also Bowles v. United States, No. 303-88L, 1994 WL 102117, at *15 (Fed. Cl. Mar. 24, 1994) (compound interest awarded to private landowner for taking of residential property); Whitney Benefits, Inc. v. United States, 1994 WL 45855 (Fed. Cl. Feb. 10, 1994) (finding taking of commercial property and awarding compound interest to compensate for significant delay).

In determining the fair market value of property taken as a result of the Corps' denial of a Section 404 application, the property is to be valued without regard to the Section 404 restrictions that gave rise to the takings claim. See Loveladies Harbor II, 21 Cl. Ct. at 156.

2. Attorneys' Fees

The U.S. Court of Federal Claims has ruled that successful plaintiffs in an inverse condemnation suit against the United States based on a denial of a Section 404 permit are entitled to an award of attorneys' fees and costs under 42 U.S.C. § 4654. See, e.g., Bowles, No. 303-88L, 1994 WL 102117, at *15; Loveladies Harbor II, 21 Cl. Ct. at 161.

The United States government agreed to pay $100,000 in litigation expenses pursuant to 42 U.S.C. § 4654 as part of a settlement of a takings claim arising from a Section 404 permit denial. Beure'-Co. v. United States, No. 129-86L (Judgment) (Cl. Ct. Dec. 16, 1991).

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United States Court of Appeals for the Federal Circuit

91-5050

LOVELADIES HARBOR, INC. and
LOVELADIES HARBOR, UNIT D, INC.

Plaintiffs-Appellees,

v.

THE UNITED STATES,

Defendant-Appellant.

Kevin J. Coakley, Connell, Foley & Geiser, of Roseland, New Jersey, argued for plaintiffs-appellees. With him on the brief were Stephen D. Kinnard and Ernest W. Schoellkopff.

Robert L. Klarquist, Attorney, Lands & Natural Resources Division, Department of Justice, of Washington, D.C., argued for defendant-appellant. With him on the brief were Lois J. Schiffer, Acting Assistant Attorney General, Environmental & Natural Resources Division, John A. Bryson, Fred Disheroon and Gary S. Guzy.

James S. Burling, Ronald A. Zumbrun and Robin L. Rivett, Pacific Legal Foundation, of Sacramento, California, were on the brief for Amicus Curiae, Pacific Legal Foundation.

Roland L. Skala, Weeks & Skala, of Yakima, Washington, was on the brief for Amicus Curiae, Cascade Development Co., Inc.

Paula K. Smith, Assistant Utah Attorney General, and Jan Graham, Utah Attorney General, of Salt Lake City, Utah, and Cheri Jacobus, Chief Assistant Attorney General, Anchorage, Alaska, and Charles E. Cole, Alaska Attorney General, of Juneau, Alaska, were on the brief for Amicus Curiae, States of Utah and Alaska.

Virginia S. Albrecht, Albert J. Beveridge, III and David S. Isaacs, of Beveridge & Diamond, P.C., of Washington, D.C., and Mary V. DiCrescenzo, National Association of Home Buildings, of Washington, D.C., were on the brief for Amicus Curiae, National Association of Home Builders.

Richard Dauphinais, Native American Rights Fund, of Washington, D.C., and Yvonne T. Knight and Patrice Kunesh, Native American Rights Fund, of Boulder, Colorado, were on the brief for Amicus Curiae, Cheyenne-Arapaho Tribes of Oklahoma.

Charles F. Lettow, Michael R. Lazerwitz and Michael A. Mazzuchi, Cleary, Gottlieb, Steen & Hamilton, of Washington, D.C., were on the brief for Amicus Curiae, DICO, Inc.

Thomas H. Shipps, Maynes, Bradford, Shipps & Sheftel, of Durango, Colorado, and Scott B. McElroy and Alice E. Walker, Greene, Meyer & McElroy, P.C., of Boulder, Colorado, were on the brief for Amicus Curiae, Southern Ute Indian Tribe.

George W. Miller, Walter A. Smith, Jr., Jonathan L. Abram and Jonathan S. Franklin, Hogan & Hartson, of Washington, D.C., were on the brief for Amicus Curiae, Whitney Benefits, Inc. and Peter Kiewit Son's Co.

Daniel J. Popeo and Paul D. Kamenar, Washington Legal Foundation, of Washington, D.C., and W. Lawrence Wallace and Carolyn M. White, Vinson & Elkins, of Washington, D.C., were on the brief for Amicus Curiae, Washington Legal Foundation, The Allied Educational Foundation, Senator Steve Symms, Senator Conrad Burns and Senator Jesse Helms.

Thomas D. Searchinger, Environmental Defense Fund, of New York, New York, was on the brief for Amicus Curiae, Environmental Defense Fund.

Appealed from: U.S. Court of Federal Claims

Chief Judge Smith

United States Court of Appeals for the Federal Circuit

91-5050

LOVELADIES HARBOR, INC. and
LOVELADIES HARBOR, UNIT D, INC.

Plaintiffs-Appellees,

v.

THE UNITED STATES

Defendant-Appellant.

DECIDED: May 24, 1994

Before ARCHER, *Chief Judge*,* and RICH, NIES, NEWMAN, MAYER, MICHEL, PLAGER, LOURIE, CLEVENGER, RADER, and SCHALL, *Circuit Judges*.

PLAGER, *Circuit Judge*.

This case first came before the court as a regulatory takings case. The United States Government (Government) appealed from the merits of a decision of the Court of Federal Claims, which had granted monetary relief to a property owner, Loveladies Harbor, Inc. and Loveladies Harbor, Unit D, Inc. (collectively, Loveladies), as a consequence of the Government's denial of a wetlands development permit. In light of an intervening decision by this court on an unrelated matter, the Government moved to dismiss for lack of jurisdiction. The court has taken the jurisdictional dispute *in banc*. We hold that this court has

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* Judge Archer assumed the position of Chief Judge on March 18, 1994.

Based on our decision in *UNR*, but prior to the decision of the Supreme Court in *UNR/Keene*, the Government moved in this court to vacate the judgment in favor of Loveladies. The Government in its motion argued that *UNR* compelled the conclusion that, since the suit in the Court of Federal Claims had been filed while the appeal in the earlier district court suit was still pending, § 1500 bars the jurisdiction of the Court of Federal Claims over the cause.

In opposition to the Government's motion, Loveladies argued that *UNR* did not compel that conclusion for several reasons, including that the same claims were not involved and that *Casman v. United States*, 135 Ct. Cl. 647 (1956) and like cases, distinguishing claims on the basis of the relief sought, supported jurisdiction.

Because of the importance of the issue, and the fact that other pending cases raise the same issue,[8] this court, sitting *in banc*, by order dated September 28, 1993, called for briefs and subsequently heard oral argument regarding the jurisdiction of the Court of Federal Claims, and by derivation the jurisdiction of this court, over this matter. After considering the briefs and

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[8] Without suggesting any view of the merits of the Government's claim in any particular case, we note that similar motions have been filed by the Government in a number of other cases now before the Court of Federal Claims. *See, e.g., Rybachek v. United States*, No. 379-89L; *Whitney Benefits v. United States*, No. 499-83C; and *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, No. 242-87L; *State of Utah v. United States*, No. 91-1428L; *State of Alaska v. United States*, No. 92-314L. In addition, the Court of Federal Claims has granted a number of such motions, which are now before this court on appeal. *See Southern Ute Indian Tribe v. United States*, No. 93-5019; *Dico, Inc. v. United States*, No. 93-5124; *Cascade Development Co., Inc., v. United States*, No. 83-5087.

arguments of the parties, and those of the several *amici*,[9] we conclude that the Court of Federal Claims had jurisdiction over the cause, and the appeal on the merits of that court's decision is properly before this court. The Government's motion to dismiss is denied.

DISCUSSION

I.

As a preliminary matter, we observe that our decision in *UNR* does not constrain our decision today. Appellants in *UNR*, asbestos manufacturers, filed suit against the United States in the district court seeking money damages based on tort claims. They then filed in the Court of Federal Claims for money damages based on certain contracts they had with the Government. Both suits arose out of the same underlying events. Appellants challenged the long-standing rule that suits involving the same operative facts and seeking the same relief were the same "claims" for purposes of § 1500, even if based on different legal theories. *See British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939) (*British American*).

Appellants in *UNR* raised another issue. Appellants' contractual claims had been filed, but not acted upon, when their district court claims were dismissed. Thus, when the Government

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[9] Briefs *amicus curiae* were filed by: Cascade Development Company; Cheyenne-Arapaho Tribes of Oklahoma; Dico, Inc.; National Association of Home Builders; Pacific Legal Foundation; Southern Ute Indian Tribe; the States of Utah and Alaska; and Whitney Benefits, Inc.

moved to dismiss their claims in the Court of Federal Claims pursuant to § 1500, appellants had no pending claims. Appellants hence argued that jurisdiction in the Court of Federal Claims was barred only if a claim was pending when the Government moved to dismiss under § 1500. In *UNR*, this court rejected both of appellants' contentions.

The Supreme Court on *certiorari* agreed. In *UNR/Keene*, the Supreme Court held that § 1500 precluded the Court of Federal Claims from exercising jurisdiction over the manufacturers' contract-based claims against the United States, because the manufacturers' tort claims were still pending in district court when suit in the Court of Federal Claims was filed. The question of whether another claim is "pending" for purposes of § 1500 is determined at the time at which the suit in the Court of Federal Claims is filed, not the time at which the Government moves to dismiss the action.

When this court decided *UNR*, we chose "to revisit the jurisprudence encumbering this statute." *Id.*, 962 F.2d at 1021. In so doing, we declared "overruled" a number of cases, including *Casman*. *UNR*, 962 F.2d at 1022 n.3. The Supreme Court took exception to our efforts. "Because the issue is not presented on the facts of this case, we need not decide whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500." *UNR/Keene*, 113 S. Ct. at 2043 n.6 (citing *Casman* and a similar case, *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988) (*Boston Five*)). At a

later point in its *UNR/Keene* opinion the Supreme Court said: "In applying § 1500 to the facts of this case, we find it unnecessary to consider, much less repudiate, the 'judicially created exceptions' to § 1500 found in *Tecon Engineers*, *Casman*, and *Boston Five*." *UNR/Keene*, 113 S. Ct. at 2044 (quoting from and citing to this court's *UNR* opinion.)[10]

As the Supreme Court has reminded us, anything we said in *UNR* regarding the legal import of cases whose factual bases were not properly before us was mere *dictum*, and therefore we will not accord it *stare decisis* effect. The Government can draw no comfort in this case from the holding of *UNR*, as affirmed in *UNR/Keene*. The issue the Government raises, and which is now properly before us on the facts of this case, is whether § 1500 denies jurisdiction to the Court of Federal Claims if, at the time a complaint for money damages is filed, there is a pending action in another court that seeks distinctly different relief. Our precedent, *Casman* and cases like it, tells us the answer is no. As we are unwilling to give *stare decisis* effect to a matter that we did not fully consider and that was not before us in the prior case, we do not consider today's case as a 'resurrection' of *Casman* (*see* dissent, *Slip op.* at 5), but as an opportunity for the Government to persuade us why we should abandon *Casman*.

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[10] *Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965) held that a later-filed action in another court does not oust the Court of Claims of jurisdiction over an earlier-filed complaint. That situation was not before this court in *UNR*.

II.

The precise issue in this case is the meaning of the term "claims" as it is used in § 1500, which states that the Court of Federal Claims shall not have jurisdiction "of *any claims* for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States . . ." (Emphasis added.) Specifically, the question is whether the "claims" which Loveladies brought to the Court of Federal Claims are the same as the "claims" which Loveladies had already sued upon in the district court. If the claims are the same, the jurisdiction of the Court of Federal Claims over the same claims, still pending before the district court when the second suit was filed, was barred by § 1500. If the claims are distinctly different, Loveladies are excused from the jurisdictional dance required by § 1500.

Deciding if the claims are the same or distinctly different "requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit." *UNR/Keene*, 113 S. Ct. at 2041. It also requires a definition of "claims" that the statute does not provide. As the Supreme Court put it, "The exact nature of the things to be compared is not illuminated, however, by the awkward formulation of § 1500." *Id.*

The legislative history of § 1500 is fairly straightforward, and was ably recounted in this court's opinion in *UNR*, 962 F.2d at 1017-19, and more briefly by the Supreme Court in *UNR/Keene*, 113 S. Ct. 2039-40. *See also* David Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 **Geo. L.J.**

573, 574-80 (1967). Like the statute, the legislative history does not teach how to identify claims that are the same for the purposes of § 1500.

The meaning and scope of the term, then, has been left to caselaw development. This court recently reviewed the question in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (*Johns-Manville*). We reaffirmed the rule that it is 'operative facts' and not legal theories by which claims may be distinguished under § 1500 when the same relief -- money damages -- is sought.[11] Johns-Manville filed indemnification claims in district courts against the Government, based on amounts it had paid for defense and settlement of suits for injuries allegedly due to exposure to asbestos products it had sold to the Government.[12] Jurisdiction in the district court was based on the Federal Tort Claims Act. While these suits were pending, Johns-Manville filed three suits in the Court of Federal Claims seeking indemnification from the Government for essentially the same losses, but this time on claims of breach of implied warranty, duty to reveal superior knowledge, and mutual mistake -- all contract based claims.

The Court of Federal Claims dismissed plaintiff's suit pursuant to § 1500. We affirmed, holding that "Claims are the same

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[11] *See also UNR*, 962 F.2d at 1024, "We decline to disturb either this precedent or Johns-Manville." "This precedent" referred to *British American* and *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F. Supp. 236 (Ct. Cl. 1957).

[12] There were also third-party complaints filed in the Eastern District of Virginia. *Johns-Manville*, 855 F.2d at 1558.

where they arise from the same operative facts even if the operative facts support different legal theories which cannot all be brought in one court." *Johns-Manville*, 855 F.2d at 1567. The court distinguished the situation before it, one in which the relief sought from both courts is money but under different legal theories, from one in which "a different type of relief is sought in the district court (equitable) from that sought in the Court of Claims (money)." *Id.* at 1566 (citing *Casman*). As the court observed, "the legislative history and the cases indicate section 1500 was enacted for the benefit of the government and was intended to force an election where both forums could grant the same relief, arising from the same operative facts." *Johns-Manville*, 855 F.2d at 1564.

Viewing claims as related to the nature of the relief sought is unremarkable.[13] And using differing relief as a characteristic for distinguishing claims was especially appropriate here, because the Court of Federal Claims and its predecessors have been courts with limited authority to grant relief. These courts could not grant the kinds of general equitable relief the district courts could, even in cases over which they otherwise have had subject-matter jurisdiction. Although the powers of the Court of Federal Claims have been increased in recent years, so that in some instances it can grant complete relief in cases over which it has

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[13] "What is a claim against the United States is well understood. It is a right to demand money from the United States." *Hobbs v. Mclean*, 117 U.S. 567, 575 (1885). *See also* **Blacks's Law Dictionary** 247 (6th ed. 1990), defining claim as, *inter alia*, a "[d]emand for money or property as of right."

subject matter jurisdiction, the Court of Federal Claims remains a court with limited remedial powers.[14]

The *Casman* case cited in *Johns-Manville* arose when a government employee sued in district court for reinstatement to his position with the Government, and while that suit was pending, sued in the Court of Claims for back pay denied him as a result of the allegedly unlawful removal.[15] When the Government moved to dismiss under § 1500 the monetary claim in the Court of Claims, that court denied the motion. The court held that the two suits alleged different "claims" -- although the two suits involved the same conflict between the same parties, the claims were distinguished by the different form of relief each sought.[16]

This court and its predecessor, although sometimes referring to the *Casman* rule as an "exception" to § 1500, see, e.g., *Johns-Manville* at 1566, have consistently applied this principle to distinguish claims. *See, e.g. Truckee Carson Irrigation District v. United*

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[14] *See, e.g.*, 28 U.S.C. § 1491(a)(2) (Supp. IV 1992) (granting Court of Federal Claims power to render judgment in nonmonetary disputes arising under the Contract Disputes Act of 1978).

[15] Under the jurisdictional rules then in effect, the district court could not grant the monetary damages alleged, and the Court of Claims did not have authority to order reinstatement. Now, under 28 U.S.C. § 1491(a)(2) (Supp. IV 1992), the Court of Federal Claims can order reinstatement.

[16] "The claim in this case and the relief sought in the district court are entirely different. The claim of plaintiff for back pay is one that falls exclusively within the jurisdiction of this court, and there is no other court which plaintiff might elect. On the other hand, the Court of Claims is without jurisdiction to restore plaintiff to his position." *Casman*, 135 Ct. Cl. at 649-50 (citations omitted). The suit in the Court of Claims was allowed to continue.

States, 223 Ct. Cl. 684 (1980); *Boston Five*, 864 F.2d 137 (Fed. Cir. 1988). *See also Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981) (takings claim was filed and prosecuted in Court of Claims during the pendency of a challenge in district court to the validity of the Corps' denial of a dredge and fill permit; the issue of whether jurisdiction was barred by § 1500 was not addressed); *Webb v. United States*, 19 Cl. Ct. 650 (1990) (relief used to distinguish a claim presented to the then Claims Court from a claim in district court).

The description of the *Casman* rule as an "exception" to § 1500 is inapt. Courts cannot create exceptions to jurisdictional grants not expressed in the statute. *Corona Coal Co. v. United States*, 263 U.S. 537 (1924). *Casman* and its progeny reflect a carefully considered interpretation of the statutory term "claims," a term undefined in the statute and subject to conflicting views as to its meaning.

Similarly, the "operative facts" rule applied in *Johns-Manville* was an interpretation of the term "claims," and was consistent with the Court of Claims decision in *British American*, which had held that two claims were not necessarily different simply because they were based on different legal theories. In *British American*, the plaintiff, acting under federal regulations and executive orders, surrendered gold bullion to the Federal Reserve Bank of New York. The plaintiff brought suit against the Government in district court under a tort theory, and in the Court of Claims under a contractual theory. In both courts plaintiff sought a money judgment. The

Court of Claims held that § 1500 barred the claim before it. It made no difference that the two suits were based upon different legal theories; the plaintiff had only one claim for money based on the same set of facts.

Courts have also long followed the principle of *British American*.[17] *See e.g. Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F. Supp. 236 (Ct. Cl. 1957); *Hill v. United States*, 8 Cl. Ct. 382 (1985); *Bennally v. United States*, 14 Cl. Ct. 8 (1987); *Johns Manville*, 855 F.2d 1556 (Fed. Cir. 1988); *UNR*, 962 F.2d 1013 (Fed. Cir. 1992); *UNR/Keene*, 113 S. Ct. 2035, 2043 (1993) ("The decision in *British American Tobacco* strikes us, moreover, as a sensible reading of the statute . . .").

Thus we have consistently tested claims against both the principle established in *Casman* and that established in *British American*. Taken together, these tests produce a working definition of "claims" for the purpose of applying § 1500. For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from *the same operative facts*, and must seek *the same relief*. We know of no case arising from the same operative facts in which § 1500 has been held to bar

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[17] Despite its lineage, it can be argued that there is a basic epistemological difficulty with the notion of legally operative facts independent of a legal theory. Insofar as a fact is 'operative' -- *i.e.*, relevant to a judicially imposed remedy -- it is necessarily associated with an underlying legal theory, that is, the cause of action. For example, without legal underpinning, words in a contract are no different from casual correspondence. Because it is unnecessary for our decision in this case, we need not further refine the meaning of 'operative facts.'

jurisdiction over a claim praying for relief distinctly different from that sought in a pending proceeding.[18]

III.

The Government presents several arguments why this case should be dismissed for lack of jurisdiction. The Government argues first that Loveladies' APA challenge to the validity of the permit denial filed in district court, and their suit in the Court of Federal Claims for just compensation under the Fifth Amendment, are in reality one claim, arising from the same operative facts, and that under the law that alone is enough to bar jurisdiction under § 1500. As our precedents establish, and as we explained above, a showing that the two claims arose from the same 'operative facts' is necessary, but not sufficient, to preclude the Court of Federal Claims from hearing a case. To come within the proscription of § 1500, the claims must also seek the same relief. Each of Loveladies' two suits prays for distinctly different relief. The Government's argument that § 1500 precludes the Court of Federal Claims from hearing Loveladies' takings claim on the ground of operative facts alone is, under the law, without merit.[19]

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[18] Our independent search has turned up no such case. At oral argument counsel for both parties were asked if they knew of any such case, and both answered in the negative.

[19] Question 3 of the court's Order of September 28, 1993, asked in part, "If some but not all of the operative facts are the same, does *Johns-Manville* require that the § 1500 bar apply?" In view of our disposition of the case, that question is not before us for decision.

The Government then argues that we should overturn long-standing precedent and adopt new law, a new definition of "claims." The Government argues that it should be enough to preclude the Court of Federal Claims from hearing a claim if another claim, arising from the same operative facts, is pending in another court, regardless of the type of relief sought. Under this theory, if we accept, as we have done *arguendo*, that Loveladies' two suits arise from the same operative facts,[20] then § 1500 denies jurisdiction to the Court of Federal Claims. The Government makes essentially two arguments in support of a new understanding of § 1500.

First, the Government reads *Corona Coal Co. v. United States*, 263 U.S. 537 (1924), to hold "the Supreme Court explicitly rejected the concept that Section 154 [the predecessor of § 1500] should be made subject to a hardship exception." True enough, and irrelevant. In *Corona Coal*, the petitioner argued that even though there was a pending suit in district court seeking the same relief based on the same facts as those in the Court of Claims suit, the statutory bar should not apply because the imminent running of the statute of limitations forced petitioner to file. The Supreme Court responded: "But the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases." *Id.* at 540.

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[20] *See* note 17 *supra*.

The case before us is not a matter in which a court-created exception to an otherwise plain piece of legislation is at issue. As we noted earlier, *Casman* did not create an "exception" to the rule of § 1500, any more than *British American* did. In each case, this court or its predecessor was called upon to specify the meaning of an ill-defined and multivalent term, "claims," in a particular factual context. *Casman* and *British American* establish two applicable principles -- (i) identity of relief requested, and (ii) identity of operative facts -- with which to test the identity of claims. As we have seen, this court has consistently adhered to those principles.

The Government's second argument for adopting its understanding of § 1500 is that, if we do not adopt the Government's view, we will return the law to the confused state it was in before our opinion in *UNR*, the opinion in which, the Government claims, we eliminated much prior case law interpreting § 1500 and thereby rectified the jurisprudence surrounding the statute. There are three problems with this argument. First, as discussed above, our opinion in *UNR* did not make all the supposedly crooked ways surrounding § 1500 straight. The common law does not work like that; that is its genius. *See South Corp. v. United States*, 690 F.2d 1368, 1371 (Fed. Cir. 1982) ("resolution of conflict, a major element in this court's mission, requires not a one-shot selection but a careful, considered, cautious, and contemplative approach.").

Second, the Government introduces no evidence of the alleged confusion presumably surrounding § 1500. We have not been shown the existence of a serious shortcoming in the case law causing irremediable difficulty for litigants. The principles of *Casman* and *British American* are not that difficult to comprehend or apply. Third, whatever residue of confusion may exist in the Government's mind on this issue, or in the minds of others, our opinion today should dispel.

The Government finally argues that, even if § 1500 does not bar the jurisdiction of the Court of Federal Claims when different relief is sought, Loveladies in fact was not seeking relief different from that sought in the district court. The Government bases this argument on a comparison of the complaints filed in those courts. The pleadings are in some respects similar (apparently parts were copied one from the other), and both ask the court to "declare" certain conclusions. Therefore, argues the Government, this case is different from *Casman* in that Loveladies sought the same declaratory relief in both courts. The dissent agrees with the Government. We do not.

The district court complaint alleges jurisdiction under both the Fifth Amendment and the Commerce Clause of the Constitution, and under § 404 of the Federal Water Pollution Control Act of 1972 (33 U.S.C. § 1344), the Administrative Procedure Act (5 U.S.C. § 554), and the general grant to the district courts of jurisdiction over federal questions, 28 U.S.C. § 1331. After reciting allegations as to all counts, the complaint sets forth

eight numbered counts. The gravamen of the First Count is the allegation that "defendant has violated the Fifth Amendment to the United States Constitution by taking plaintiffs' private property for public use without compensation." The remaining counts allege various wrongs in the regulatory authority and practices of the Corps as they relate to the Loveladies case. The complaint closes with a prayer that asks the court for relief, including:

> 2. Declaring that the action of the defendant in denying the permit application of plaintiffs constitutes a taking of property in violation of plaintiffs' rights under the Fifth Amendment of the United States Constitution;
> . . . .
> 4. Declaring that the regulations relied upon ... are unconstitutional [as beyond the scope of the Commerce Clause];
> . . . .
> 5. Declaring that the regulations relied upon ... are ***ultra vires*** . . .

and concludes with the usual "granting such other relief . . ." prayer.

The complaint in the Court of Claims is similar, but shorter. The jurisdictional allegations are limited to the Fifth Amendment, and to § 404 of the Federal Water Pollution Control Act[21] and 28 U.S.C. § 1494, the Tucker Act. There are only two counts. The first is a repeat, somewhat expanded, of the first count of the district court complaint. The second count repeats some of the allegations about the arbitrary nature of the Corps' decision. The prayer again, ***inter alia***, includes a request for relief that the court declare that the action of the defendant in denying the

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[21] Both the district court and Court of Claims complaints contain the same typographical error -- they refer to the Federal Water Pollution ***Contract*** Act.

permit application of plaintiffs constitutes a taking of property in violation of plaintiffs' rights under the Fifth Amendment of the United States Constitution.

It is important to note that the prayer in the Court of Claims complaint contained an express request for damages. Significantly, that request was missing from the complaint in the district court. Furthermore, despite asking that the court 'declare' relief, neither complaint, in the jurisdictional allegations or elsewhere, refers or cites to the Declaratory Judgment Act, 28 U.S.C. § 2201. Nor has the Government pointed to anything that suggests the proceedings were conducted under that Act, or in accordance with the rules that govern such proceedings.[22] In each suit, the full relief requested could have been granted by, in the case of the district court suit, a mandatory injunction, and in the case of the Court of Federal Claims suit, a decree for money damages, without either court "declaring" anything. The use of the term "declaring" in the prayers for relief was clearly intended to convey a request different from a formal declaration under the Declaratory Judgment Act.

The Government further argues that the presence of an allegation of a taking in the two complaints means that the claims in the district court suit were the same claims as those in the Court of Federal Claims suit, since Loveladies sought in the district court a declaration of taking and thus implicitly the

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[22] *See* **Fed. R. Civ. P.** 57.

monetary relief that would accompany the declaration.[23] But the Government itself destroyed the core of that argument in its answer to that complaint. In the district court, the Government stated as its First Separate Defense: "This Court lacks subject matter jurisdiction over the Complaint's allegations of a taking of property." The district court agreed with the Government's view that Count I was without legal significance as far as a taking and compensation under the Fifth Amendment were concerned. While granting judgment in favor of the Government on all other counts, that court dismissed Count I without prejudice to the rights of plaintiffs to pursue the takings allegations in the Court of Federal Claims.[24] The prayer for a "declaration" of a taking, for which the First Count was the predicate, thus was equally without legal significance.

By contrast, in the complaint in the Court of Federal Claims Loveladies clearly alleged that a taking had occured, and that just compensation was due them. As we have often noted, the Tucker Act, which was cited by Loveladies as their jurisdictional base, provides jurisdiction for damage suits against the United States Government, but a recovery against the Government requires a substantive right created by some money-mandating constitutional

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[23] We note in passing that the allegations of a taking, found in both complaints, could be viewed as reflecting the legal theory assumed to underlie the factual allegations. Since differing legal theories do not define differing claims under § 1500, there seems no logical reason to suppose that overlapping legal theories (*see* dissent, *Slip op.* at 9) necessarily define the same claims.

[24] The Government, as well as Loveladies, consented to the dismissal.

provision, statute or regulation that has been violated, or an express or implied contract with the United States. *See, e.g., United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983) (*in banc*), *cert. denied*, 465 U.S. 1065 (1984). That Loveladies sought a clear finding or "declaration" of their rights under the Fifth Amendment as the money-mandating source of their entitlement to recovery seems hardly surprising.

In sum, reading the two complaints in light of the legal and factual circumstances in which they were drawn leaves little doubt what was intended by the prayers for relief contained in them. At the time Loveladies filed their complaint in the district court seeking invalidation of the Government's action, they may not have foreseen the possible complications that might arise if they later sought monetary relief in the Court of Federal Claims. If they had, perhaps they might have framed their pleadings with more precision. Be that as it may, the claims in the two courts are for distinctly different and not the same or even overlapping relief -- this case presents the straightforward issue of plaintiffs "who seek distinctly different types of relief in the two courts." *UNR/Keene*, 113 S. Ct. at 2044-45.[25]

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[25] The dissent invokes the overruling of *Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966), by this court in *UNR* and the Supreme Court's agreement in *UNR/Keene* as somehow relevant to the overlapping relief issue. But *Brown* was a case in which, despite § 1500, the Court of Claims had allowed a suit to proceed that was filed in that court while a district court action seeking the same relief was pending. The reasoning in *Brown* was in direct conflict with this court's and the Supreme Court's view of § 1500 as applied to such cases, and obviously was not good law. The facts of *Brown* remove it from any application to the issues in this case.

IV.

The result we reach on the Government's motion is further supported by the Supreme Court's decision in ***Pennsylvania Railroad Co. v. United States***, 363 U.S. 202 (1960). In that case the Supreme Court confronted the basic issue here: the interplay of two legally recognized and protected rights, which, because of the statutory jurisdictional structure, are thrown into apparent conflict. The problem arose there, as it does here, when a federal government agency exercised its regulatory power in a manner that raises questions both of the validity of the exercise and, if valid, the economic consequences of the exercise.

In ***Pennsylvania Railroad***, war conditions had prevented the Government's planned exportation of certain raw materials to Great Britain. The Pennsylvania Railroad charged the Government the higher 'domestic' rate for transport of the materials (the railroad charged less for transport of goods for export). The Government paid the higher domestic rate, but then set-off the amount of the price difference from other obligations it owed to the railroad. The railroad brought suit in the Court of Claims to recover the amount so deducted. ***Id.*** at 203.

The Court of Claims proceedings initially were suspended while the railroad and the Government disputed before the Interstate Commerce Commission (ICC) the correctness under governing regulations of the rates, an issue which was under ICC jurisdiction. The railroad disagreed with part of the ICC's determination, and appealed to the District Court as the statute

provided, seeking to set aside the ICC order. Plaintiff railroad requested that the Court of Claims continue to stay its proceedings pending the District Court ruling on the validity of the ICC determination. The Court of Claims declined to do so. *Id.* at 203-04.[26]

The Supreme Court held that this was error:

> [J]urisdiction [to review the ICC determination] is vested exclusively in the District Courts. . . . It necessarily follows, of course, that since the Railroad ***had a right to have the Commission's order reviewed***, and only the District Court had the jurisdiction to review it, ***the Court of Claims was under a duty to stay its proceedings pending this review.***

Id. at 205-06 (emphasis added).

The plaintiff in *Pennsylvania Railroad* had a right to have the Commission's order reviewed because it determined certain rights and obligations which had significant legal consequences for its dispute with the Government. Plaintiffs such as Loveladies, too, have a right to have the Corps' permit denial reviewed, without being placed in the position of having to give up a substantial legal right protected by the Takings Clause of the Constitution. *See also Aulston v. United States*, 823 F.2d 510, 514 (Fed. Cir. 1987) (Claims Court ordered to "hold appellants' taking claim on its docket in suspension for such time as is reasonably necessary for

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[26] The Government sought also to dismiss the Court of Claims action, citing § 1500. The Court of Claims denied the motion, and the Supreme Court specifically noted that the issue was not challenged on appeal. *Id.* at 204. If jurisdiction as defined by § 1500 were at issue, the Supreme Court's indifference to the question of its jurisdiction would be puzzling since it is a basic principle that courts must attend to their jurisdiction even if the parties do not. *Louisville & Nat'l R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908); *UNR*, 962 F.2d at 1022.

appellants to challenge the [agency] decision in a district court, and if successful there, to return promptly to the Claims Court.").

The plaintiff in *Pennsylvania Railroad*, after filing in the Claims Court, was confronted with the necessity of litigating the regulatory issue in another court. In the case before us, plaintiffs filed the APA action in the district court first, and then filed the takings claim in the Court of Federal Claims. In a takings case this is entirely logical -- if the validity of the regulatory imposition is to be challenged, it makes sense to pursue the validity question first so as to determine the necessity for prosecuting the takings claim. The risk of course is that too long a time may be required for initiation of a suit, discovery and other pretrial activities, and decisions at both trial and appellate levels. It may not always be possible because of the statute of limitations for a plaintiff to wait for the regulatory challenge case to be finally concluded before filing in the Court of Federal Claims.[27]

Litigation can serve public interests as well as the particular interests of the parties. The nation is served by private litigation which accomplishes public ends, for example, by checking the power of the Government through suits brought under the APA or under the takings clause of the Fifth Amendment. Because this nation relies in significant degree on litigation to control the excesses to which Government may from time to time be prone, it would not be sound policy to force plaintiffs to forego

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[27] 28 U.S.C. § 2501 (Supp. IV 1992) sets the bar at 6 years.

monetary claims in order to challenge the validity of Government action, or to preclude challenges to the validity of Government action in order to protect a Constitutional claim for compensation. Section 1500 was enacted to preclude duplicate cotton claims -- claims for money damages -- at a time when *res judicata* principles did not provide the Government with protection against such "duplicative lawsuits." *UNR/Keene*, 113 S. Ct. at 2039. Whatever viability remains in § 1500, absent a clear expression of Congressional intent we ought not extend the statute to allow the Government to foreclose non-duplicative suits, and to deny remedies the Constitution and statutes otherwise provide.

CONCLUSION

The motion of the Government that the judgment of the Court of Federal Claims be vacated and the complaint dismissed is denied. The case is returned to the panel for decision on the merits.

MOTION DENIED.

United States Court of Appeals for the Federal Circuit

91-5050

LOVELADIES HARBOR, INC. and
LOVELADIES HARBOR, UNIT D, INC.,

Plaintiff-Appellees,

v.

THE UNITED STATES,

Defendant-Appellant.

MAYER, Circuit Judge, with whom NIES* and RADER, Circuit Judges, join, dissenting.

Because I see no reason to reconsider our recent in banc decision in UNR v. United States, 962 F.2d 1013 (Fed. Cir. 1992), aff'd sub nom. Keene Corp. v. United States, 508 U.S. ____, 113 S. Ct. 2035 (1993), I dissent.

I.

A court is free to reverse itself when it sits in banc, of course, but "any departure from the doctrine of stare decisis demands special justification," which is missing from today's undertaking. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (citation omitted)). This is especially so "in the area of statutory interpretation, for here, unlike in the context of

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* Circuit Judge Nies vacated the position of Chief Judge on March 17, 1994.

constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." Id.

This case revolves around the authority of the Court of Federal Claims to hear petitioners who have a suit against the government relating to the same claims pending in another court. 28 U.S.C. § 1500 (Supp. IV 1992).[1] Like all federal courts, the Court of Federal Claims has limited jurisdiction, with a range of authority extending only so far as Congress, by statute, permits; the statutes that define the court's jurisdiction must be strictly construed. Keene, 113 S. Ct. at 2040. Though this may work injustice in a particular case, we cannot, in the interest of justice or equity, presume to expand jurisdiction beyond these narrow bounds. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988).

In UNR we addressed the meaning of "claim" under section 1500. 962 F.2d at 1023. The claims heard by the Court of Federal Claims generally involve requests for monetary relief. But it does not follow that only suits brought in other courts for money damages can give rise to section 1500's jurisdictional bar. Section 1500 divests the Court of Federal Claims of jurisdiction over such a claim where the plaintiff has a suit for the claim pending in another court or where the one in the Court of Federal Claims

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[1] The United States Court of Federal Claims shall not have jurisdiction of any claims for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States . . . .

Id.

relates to -- is "in respect to" -- another suit. The jurisdictional question raised by section 1500 is thus not simply whether the claims are the "same," but whether they are sufficiently related to invoke the bar. In UNR, the in banc court reaffirmed that the answer lies in a comparison of the operative facts from which the suits arise. "[C]orrectly construed, section 1500 applies to all claims on whatever theories that 'arise from the same operative facts.'" 962 F.2d at 1023 (citation omitted).

UNR was "a comprehensive effort to set out the proper interpretation of a jurisdictional statute, a matter that does not require a pointed dispute between parties. Courts are obliged to resolve jurisdictional questions on their own even if parties do not raise them. In the course of this interpretive effort, if prior cases are seen as inconsistent, it is incumbent on the court to acknowledge their nonviability." 962 F.2d at 1023. At issue were the indemnification claims of corporations who manufactured and supplied asbestos products in the course of contract work for the government. When workers filed personal injury suits against the corporations arising from exposure to their products, the defendants sought indemnification from the government in district court, alleging tort theories, and in the Court of Federal Claims on contractual theories.

We confirmed the trial court's dismissal of the claims, holding that section 1500 applied regardless of which action was first filed, and that "claim", as it appears in the statute, refers not to the legal theory of the suit but to the operative facts

supporting the petitioners' various actions. Thus, we held that the petitioners' claims in the Court of Federal Claims were claims for or in respect to which they had suits pending in the district court, even though the former were based on contractual theories of recovery and the latter on tort theories, because they arose from the same personal injuries. Id. at 1023.

We also considered the exception to this rule set out in Casman v. United States, 135 Ct. Cl. 647 (1956), which excused adherence to section 1500 where the claims in question seek different forms of relief. We all knew a factual predicate for a Casman exception was not before us in UNR, but during the course of our consideration of the statute, it was plain that we could not square that and like cases with the clear meaning of the jurisdictional statute. That statute, as a whole, was before us in UNR; there is no requirement that a factual predicate underlay every jot and tittle of it before a court can explain what it means.

The history of section 1500 is replete with instances where courts sought to temper perceived inequity by inventing exceptions to the rule. See 962 F.2d at 1020. In Casman, the injustice was thought to arise because no court was able to simultaneously grant complete relief to the petitioner: he sought restoration to his position, available only in the district court, and back pay, which he could only recover in the Court of Claims. Casman held section 1500 inapplicable because it was thought unfair to force the plaintiff to choose between the two courts. 135 Ct. Cl. at 650.

But it is axiomatic that courts cannot extend their jurisdiction in the interest of equity. Christianson, 486 U.S. at 818. Faced with a jurisdictional statute riddled with judicially created loopholes, in UNR we concluded that section 1500 should be applied according to its plain words, and that instrumental to such application was a single, coherent definition of the word "claim" as referring only to the facts underlying the petitioner's action against the government. This construction is consistent with precedent stretching back sixty years or more. UNR, 962 F.2d at 1023; Johns-Manville Corp. v. United States, 855 F.2d 1556, 1563 (Fed. Cir. 1988); British American Tobacco Co. v. United States, 89 Ct. Cl. 438, 440 (1939).[2] We overruled Casman because it was in conflict with this interpretation.

The Supreme Court agreed that "the comparison of the two cases for purposes of possible dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested." 113 S. Ct. at 2042. Finding that the Casman exception was not implicated by the facts of the case before it, the Court chose not to decide whether two actions seeking different relief would require dismissal under the

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[2] The court tells us that we have always applied section 1500 pursuant to a two pronged test, operative facts and relief requested. But there is no evidence of this before the Casman departure in 1956, a period of some 88 years after the statute was enacted. We did not notice this phenomenon in our UNR exercise, and the Supreme Court apparently missed it in Keene, as well. See 113 S. Ct. at 2043.

statute. Id. at 2043 n.6. The Court said nothing by way of disapproval of our ruling on Casman. But nine of the ten judges hearing that case here said that Casman was unsound and inconsistent with section 1500. One wonders why six of them now think otherwise.

Be that as it may, now, only one year later, the court resurrects Casman, scrambling once more down the path of judicial revision of the statute. Normally, "[i]n cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress." Patterson, 491 U.S. at 173. To my knowledge, no laws have changed in the short time since we decided UNR. Departing from stare decisis demands more than cursory distinctions -- at the very least, one would expect reversal of our so recent in banc precedent to be supported by some compelling reason.

"[A] traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law . . . ." Id. This was the justification which supported the overruling of Casman in UNR. We said there that section 1500, which had become a judicial embarrassment, a monument to cynicism, "is now so riddled with unsupportable loopholes that it has lost its predictability and people cannot rely on it to order their affairs." 962 F.2d at 1021. In fact, only the other day we unanimously agreed that "fail[ure] to adhere to a statutory mandate over an extended period of time does not

justify . . . continuing to do so." In re Donaldson, 16 F.3d 1189, 1194 (Fed. Cir. 1994) (in banc).

I agree that plaintiffs should have access to the full range of remedies which the Constitution and statutes provide, especially in light of the important public interest in controlling government excesses. Indeed, the claims of these property owners might well be valid on the merits, if only it were appropriate to reach them. When the government takes private property it must pay just compensation. But Congress set out just how such plaintiffs may bring their suits; we have no right to second guess in the absence of congressional transgression of the Constitution.

It cannot seriously be doubted that Congress has the power to order that the government need not defend claims arising from the same operative facts simultaneously in several forums. That a commonly based suit is pending in the district court does not necessarily forever divest the Court of Federal Claims of jurisdiction over a claim; section 1500 decrees only that a party cannot maintain actions in both courts at the same time. It may sometimes happen that the district court challenge is not finished within six years, after which any Court of Federal Claims action would be barred. See 28 U.S.C. § 2501 (1988 & Supp. IV 1992). But statutes limiting courts' jurisdiction will always work injustice in particular cases. Christianson, 486 U.S. at 818. See also Keene, 113 S. Ct. at 2045. This is not such a case, however, for Loveladies' district court action, including its appeal to the Court of Appeals for the Third Circuit, was resolved within three

years. See Loveladies Harbor, Inc. v. Baldwin, Civ. No. 82-1948 (D.N.J. March 12, 1984), aff'd 751 F.2d 376 (3d Cir. 1984). Loveladies still would have had three years in which to file its claim in the Court of Federal Claims for compensation after the resolution of its challenge to the permit denial.

As we said in UNR, "[i]t may have seemed unfair 'to deprive plaintiffs of the only forum they [had] in which to test their demand,' but that does not justify rewriting the statute." 962 F.2d at 1022 (citation omitted). "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." TVA v. Hill, 437 U.S. 153, 194 (1977).[3] In Keene, the Supreme Court suggested that efforts to reform section 1500 should

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[3] In words worthy of our consideration, the Court continued: "The lines ascribed to Sir Thomas More by Robert Bolt are not without relevance here:

> The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you -- where would you hide, Roper, the laws being flat? . . . This country's planted thick with laws from coast to coast -- Man's laws, not God's -- and if you cut them down . . . d'you really think you could stand upright in the winds that would blow them? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.

437 U.S. at 195 (quoting R. Bolt, A Man for All Seasons, Act I, p. 147 (Three Plays, Heinemann ed. 1967)).

be addressed to Congress. 113 S. Ct. at 2045. That was the point of UNR, and I still think so. In fact, a bill to do just that has been introduced. S. 1355, 103d Cong., 1st Sess. (1993).

II.

Finally, the court's resurrection of Casman is not even supported by the facts of this case. The government argues that in both the district court and the Court of Federal Claims the complaints sought relief "[d]eclaring that the action of the defendant in denying the permit application of plaintiffs constitutes a taking of property in violation of plaintiffs' rights under the Fifth Amendment of the United States Constitution." This is sufficient overlapping relief to make the question one of operative facts alone, even under this court's imaginative reading of Keene. See 113 S. Ct. at 2043 (relying on operative facts when there is "some overlap in the relief requested").

The court elides this argument by saying that we should ignore the words of the complaints -- language expressly requesting a declaration of a taking -- and substitute instead its understanding of what Loveladies must have intended by the several suits. It concludes that Loveladies did not seek overlapping relief because it must not have intended to request a "formal" declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1988). For support, the court notes that Loveladies also requested damages in the Court of Federal Claims, while it requested none from the district court. It then cites the absence of any express reference

to the Declaratory Judgment Act, and the lack of any evidence that the proceedings were conducted according to the rules governing proceedings under that act. Finally, the court points out that Loveladies had adequate remedies in both the district court and the Court of Federal Claims without either court declaring anything. From this, it supposes that Loveladies could not really have been requesting declaratory relief at all.

But declaratory relief is not some special, exclusive remedy; it is an additional form of relief, readily available even when it would be cumulative of other requested relief. 28 U.S.C. § 2201 (allowing declaration of rights "whether or not further relief is or could be sought"); Fed. R. Civ. P. 57 ("The existence of another adequate remedy does not preclude a judgment for declaratory relief . . . ."). It is simply irrelevant that Loveladies asked for monetary relief in one forum and not in the other, and that either court could grant adequate relief aside from any declaration.

Nor is it surprising that Loveladies did not rely on the Declaratory Judgment Act as a basis for jurisdiction, since that act is not an independent source of federal jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950); Speedco, Inc. v. Estes, 853 F.2d 909, 911 (Fed. Cir. 1988). Indeed, there is no special set of procedures governing declaratory judgment actions; they are controlled by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 57. Under those rules, Loveladies needed only to state facts adequate to support its request for relief; no ritualistic citation to the Declaratory Judgment Act was necessary.

That said, the court's position reduces to a decision to ignore Loveladies' request for overlapping relief because it resulted from imprecise pleading, a mere oversight that we should excuse since the district court had no jurisdiction to address the takings allegation. But it makes no difference under section 1500 whether there is subject matter jurisdiction in the district court, or not. See Frantz Equipment Co. v. United States, 98 F. Supp. 579, 580 (Ct. Cl. 1951) ("The applicability of Sec. 1500 to the first claim of plaintiff, asserted in its petition herein, is not conditioned upon the question of whether the District Court had jurisdiction of the claim asserted by the plaintiff therein . . . ."). All that matters even under the court's new rule is that Loveladies had a suit pending in the district court seeking relief overlapping that requested in the Court of Federal Claims. That the district court ultimately dismissed the first count is irrelevant; it was pending when Loveladies filed suit in the Court of Federal Claims, so section 1500 applies.

The result of the court's machinations is to revive Brown v. United States, 358 F.2d 1002, 1005 (Ct. Cl. 1966), which said, "Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in this court (with conceded jurisdiction, aside from Section 1500) and in another tribunal which is without jurisdiction." But we overruled Brown in UNR, 962 F.2d at 1022, and in Keene the Supreme Court expressly agreed, 113 S. Ct. at 2045 & n.12.